

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 2054873
60964

FILE: B-185100

DATE: June 10, 1976

MATTER OF: ASC Systems Corporation

98849

DIGEST:

1. Protest that contractor is nonresponsible because of inability to meet delivery schedule will not be considered since practice of reviewing protests against contracting officer's affirmative responsibility determination has been discontinued, except for actions by procurement officials which are tantamount to fraud.
2. Protest by unsuccessful bidder alleging mistake in awardee's bid is denied where awardee confirmed bid price following request for verification by contracting officer. Moreover, allegation of "buy-in" does not afford a basis for questioning legality of an award.
3. Request by unsuccessful bidder that contracting officer be instructed to prevent awardee from recovering certain costs of performance is not for consideration by GAO since it involves matter for resolution by agency in course of administration of contract.

ASC Systems Corporation (ASC) protests award to Sound Devices, Inc. in connection with Invitation for Bids N00383-76-B-0119, issued by the Naval Aviation Supply Office, Philadelphia, Pennsylvania. The protester's initial basis for protest is that the solicitation's delivery schedule is incapable of performance by anyone other than a previous supplier who qualifies for waiver of the first article test requirement stated in the solicitation. The protester, who was the second low bidder, qualifies for such waiver; the awardee does not.

The ability of Sound Devices to comply with the delivery schedule established by the solicitation is a matter of contractor responsibility. This Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64.

Affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform.

As alternative grounds for protest, ASC argues that Sound Devices has not included in its bid any estimate of nonrecoverable costs that may result from disapproval or conditional approval of the first article. ASC contends that this omission constitutes a mistake in bid, if inadvertent, or an attempted "buy-in," if intentional.

As to the possibility of a mistake in bid, Armed Services Procurement Regulation § 2-406.1 (1975 ed.) requires that contracting officers examine bids for mistakes and seek verification of bids containing evidence of mistake. By letter of October 3, 1975, the contracting officer requested verification of Sound Device's bid. By letter dated October 6, 1975, Sound Devices confirmed its bid price. Thus, we are aware of no evidence of a mistake in Sound Device's bid which would justify questioning the contract award.

The protester further alleged that if the omission from Sound Device's bid of nonrecoverable costs was not inadvertent, but intentional, then it is attempting a "buy-in" which is defined by ASPR § 1-311(a) as the practice of submitting a bid for less than the anticipated cost with the expectation of future price increases arising out of change orders, follow-on contracts, or other means. In Matter of A.C.E.S., Inc., B-181926, January 2, 1975, 75-1 CPD 1, we stated:

"ASPR § 1-311 does not prohibit "buy-in" bids. Rather, it provides certain steps to be taken to avoid any recoupment of costs through change orders or follow-on procurements. In any event, an alleged "buy-in" does not afford a basis to question the legality of an award. Matter of Wexler Paper Products, B-179231, January 22, 1974."

Thus, the "buy-in" allegation, by itself, does not raise any basis for disturbing the contract award. While a low bid may raise a question as to whether the bidder is capable of performing the contract at its bid price, this is a matter to be resolved by the contracting officer in connection with his determination of responsibility. As stated above, we will not review the contracting officer's affirmative determination of responsibility in this case.

Finally, the protester asks that the contracting officer "be instructed to take decisive affirmative action to ensure that Sound Devices, Inc. does not recover the costs of purchased but unapproved vendor parts through change orders or claims." This request does not relate to the legality of the award process, but rather is properly for resolution by the contracting agency during the course of contract administration. Matter of Columbia Loose-Leaf Corporation, B-184645, September 12, 1975, 75-2 CPD 147.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States